87-837

NO._____

Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

REBECCA W. CHERRY, et al,

Petitioners,

Vs.

COAST HOUSE LTD., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1.

When a party choses a lawyer to represent that party in litigation and advises the Court that said party whishes said attorney to continue his representation, the client has a right to be represented by the attorney selected by the party and the attorney has a separate right to represent such a client; and any statute, court decision or rules, regulations or cannons issued by either the State Bar of Georgia or the American Bar Association, which would limit or restrict or eliminate said right of the client or said right of the lawyer, is void and illegal in that such would deprive both the attorney and the client of rights guaranteed under the Constitution of the United States and under the Constitution of the State of Georgia.

2.

Where the rules of procedure of the trial court provide that oral argument on any motion shall be permitted upon written request, and where the trial court issued an order several months after a written request had been made and no hearing was granted, and where the trial court issued another order before the party opposing the motion had any opportunity to submit a written request for oral argument, was not the party, who was not granted any hearing, denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

Petitioners, Rebecca W. Cherry, et al, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on September 9, 1987,

OPINION BELOW

The opinion of the Supreme Court of Georgia has not been reported. The opinion, dated September 9, 1987, is set forth in full in the Appendix A-1.

The decision held (1) that Cherry's attorney was disqualified from representing Cherry because said attorney would be called as a witness by opposing parties and (2) that the trial court was correct in issuing two separate orders on motions without granting a hearing to the party opposing the motions.

JURISDICTION

The opinion of the Supreme Court of Georgia was issued and entered on September 9, 1987. The jurisdiction of this court is envoked under 28 U.S.C. §1257.

STATUTES INVOLVED

1.

The Fifth and Fourteenth Amendments to the Constitution of the United States.

2.

Article I, §1, ¶IV, of the Constitution of the State of Georgia. (Appendix B-1)

STATEMENT OF CASE

1.A PARTY'S RIGHT TO CHOOSE HIS OWN COUNSEL

One of the petitioners herein, Mrs. Rebecca W. Cherry (hereinafter "Cherry"), owns an undivided interest in a beach front lot on St. Simons Island, Georgia. In August 1983 Cherry employed Moreton Rolleston, Jr., the other Petitioner herein (hereinafter 'Rolleston"), to file suit in Glynn Superior

Court, Georgia, to establish title to and easement over all of the accreted land which had built up between her lot (including house thereon) and the Atlantic Ocean over a long period of time. Thereafter Cherry entered into a contract with Davis to sell her title in the accreted land and also her undivided interest in the house. The sale of the accreted land would be closed after a final judgment awarding title to Cherry of the accreted land. The sale of Cherry's interest in the house was to be consummated on December 3, 1984.

Just prior to December 3, 1984 Davis stated that he was not ready to close on the house, asked for an extension, and was granted one for a closing to be held on May 31, 1985 in Brunswick, Georgia. At Davis' request the closing of the sale of the house was set for 3:30 PM on May 31st. The accreted land case had been tried on motions for summary judgment and appealed to the Georgia Supreme Court,

but no final order had been entered awarding title to the accreted land to anyone; therefore, the accreted land case was not ready for closing.

Cherry knew that Davis had made several attempts to sell his contracts regarding both the accreted land and the cottage and also knew that Davis was in financial difficulty. The amount due on the purchase price for the house was $165,000 and Cherry had reason to believe that Davis could not preform. Therefore, after consultation with Rolleston, Cherry and Rolleston decided that Rolleston would go to the closing on May 31, 1985 and would take with him a court reporter to take down whatever was said or happened at the closing and also take another lawyer as a witness in the event there was any disagreement as to what happened at the closing. Cherry lived in Atlanta

and did not want to make a useless, 300 mile trip to Brunswick, but Cherry was available to make the trip by airplane to consummate the sale if in fact Davis produced the purchase money.

Rolleston, a court reporter, and another lawyer (witness) met with Davis and his lawyer from 3:30 PM to 5:15 PM on May 31st. Davis stated at the closing that he had not assigned or transferred his interest in the contract for the house to anyone but that he did not have the purchase money available at that time. He said he was trying to sell his contract to the Respondents named herein (hereinafter "Coast House"). At 5:15 PM Rolleston, the court reporter and the other lawyer (witness) left the meeting. No offer to pay the purchase price was made by Davis or Coast House. Davis later made an affidavit that he assigned and transferred his interest in the contract for the

house and the accreted land to Coast House some time during the evening of May 31, 1985 but after 5:15 PM when the scheduled meeting had ended.

In December 1985, Coast House filed a suit in Fulton Superior Court in Atlanta, Georgia, against Cherry and Rolleston for specific preformance of the sales contract for the house and for damages against Cherry for failing to consummate the sale on May 31, 1985. Said suit also contained a Count against Rolleston for tortious interference with the sales contract; as to this Count the lower court granted Rolleston a summary judgment which has been upheld by the Georgia Supreme Court. The Counts for specific preformance and damages against Cherry are still pending and have been set for trial on February 1, 1988 by special order of the trial court.

Coast House on March 3, 1986 filed a motion to disqualify Rolleston from representing Cherry in the suit brought by Coast House against Cherry. On April 2, 1986 Cherry filed a response to said motion which contained a written request for oral argument pursuant to Rule 6.3 of the Uniform Superior Court Rules of Georgia. Without granting any hearing or oral argument, the trial court on December 2, 1986 issued an order disqualifying Rolleston from representing Cherry without stating any reason for the disqualification, a copy of said Order being set forth in Appendix C-1.

On December 15, 1986 Coast House filed a motion for clarification of the order of the trial court, dated December 2, 1986. On the following day, December 16, 1986, without a hearing and without even giving Cherry an opportunity to request a hearing, the trial court issued another order stating that Rolleston was disqualified from representing Cherry, "the Court having found there is a

conflict as Moreton Rolleston, Jr. will be called as a witness on behalf of the Plaintiffs", a copy of said order being set forth in the Appendix D-1 (Emphasis added). Note that the basis for disqualifying Rolleston was that he would be called by opposing counsel as a witness for the opposing party, not as a witness for his own client (Cherry).

The orders of December 2nd and December 16th, 1986 were appealed to the Georgia Supreme Court on the ground that each was a nullity and on the further ground that Cherry had the right to choose her own counsel and that there was no legal grounds for disqualifying Rolleston as Cherry's counsel. The Georgia Supreme Court affirmed the lower court and this application for certiorari is made to review the decision of the Georgia Supreme Court.

Cherry had two good reasons for selecting Rolleston as her attorney. Rolleston had represented Cherry's husband in his business for about 40 years. Rolleston represented three of Cherry's sons in legal matters. Rolleston represented Cherry as Executor of her husband's estate. Cherry and her family have been close friends of Rolleston for 40 years. Obviously, Cherry had confidence in Rolleston. The second reason is that Rolleston has been involved in litigation regarding title to lands fronting on the Atlantic Ocean in Glynn County, Georgia in 13 cases that have been appealed to the Georgia Supreme Court, including the first case in Georgia which decided who owned the title to the beaches in Georgia (Lines, et al vs. Ashmore, et al, 236 Ga. 401, p. 413 and 414) and in another land accretion case which decided the location of the high water mark of the Atlantic Ocean on Georgia beaches. Cherry felt that

Rolleston had more experience regarding accreted land and beach cases than any other lawyer in Georgia.

The trial court's order disqualifying Rolleston as Cherry's counsel is in violation of Article 1, Section 1, Paragraph IV of the Constitution of the State of Georgia which reads as follows:

> "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both."

2. DUE PROCESS - FAILURE TO GRANT A HEARING

Rule 6.3 of the Uniform Rules of the Superior Courts of Georgia provides as follows:

"Unless otherwise ordered by the court all motions in civil actions, including those for summry judgment, shall be decided by the court without oral hearing, except motions for new trial and motion for judgment notwithstanding the verdict. Oral argument on any motion shall be permitted upon written request."

In the case of Kelly v. First Franklin Financial Corporation and Kelly vs. Stockton, Whatley, Davin & Company et al, 256 Ga. 622, the Supreme Court held on page 623 as follows:

"Rule 6.3 insures a right to oral argument of a summary judgment motion by declaring it 'shall be permitted upon written request.' (Emphasis supplied) Thus, whether oral argument is heard is within the power of the parties, and is not left to the discretion of the trial court. See Spikes vs. Citizens State Bank, 179 Ga. App. 479, 481 (347 SE2d 310) (1986). All a party need do is make a written request for oral argument and it shall be held. See Deal v. Rust Engineering Co., 169 Ga. App. 60.

The failure of the Court to grant a hearing, which had been requested in writing, prior to the issuing of the trial court's order of December 2, 1986 constituted the denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the U.S. The trial court's order of December 16, 1986 was granted the day after a motion was made by opposing parties and without giving Cherry an opportunity to request a hearing or reply to the motion. We contend that the granting of the trial court's order of December 16th wiithout the opportunity for a hearing also constituted denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the U.S.

WHEN FEDERAL QUESTIONS WERE RAISED

There never has been a hearing in the trial court regarding the question raised by the orders of

the trial court dated December 2 and December 16, 1986. Within 30 days after those orders, an appeal was filed to the Georgia Supreme Court. Briefs were timely filed and these briefs raised the question of violations of due process guaranteed by the U.S. Constitution.

REASONS WHY CERTIORATI SHOULD BE GRANTED

The right of a litigant to choose his own counsel is an essential element of due process as guaranteed by the Constitution of the U.S. and the Constitution of the State of Georgia. The Constitution of the State of Georgia further specifically bestows that right upon a litigant. In this case, the trial court first held that Rolleston could not represent

Cherry after December 16, 1986, which was affirmed in the Georgia Supreme Court. On October 16, 1987 the trial judge stated that Rolleston could continue to represent Cherry until the trial but not during the trial which has been specifically set for February 1, 1988. True, counsel selected by litigant must be in good standing. In this case, Rolleston was admitted to practice law in 1941 in Georgia and has tried cases in the trial courts of Georgia, Georgia Court of Appeals, Supreme Court of Georgia, U.S. District Courts of Georgia, North Carolina and Delaware, Circuit Courts of Appeal in the Third, Fourth, Fifth and Eleventh Circuits and in the U.S. Supreme Court.

The opinion of the Georgia Supreme Court cited cannons and ethical considerations (EC) and directives (DR) promulgated by the State Bar of Georgia. They are similar to those of the American Bar Association.

The substance of those rules is that the attorney must decide whether he will appear as a witness for his client or represent his client as attorney. These rules do not apply where an opposing party calls the litigant's counsel as a witness, which is exactly the erroneous reasoning relied upon by the lower court. If counsel can be disqualified by simply calling him as a witness, there would be no end to disqualification by opposing counsel because he could issue a subpoena to any lawyer representing the opposite party.

We contend, furthermore, that neither the State Bar of Georgia nor the American Bar Association nor any legislative body can restrict the right of a litigant to choose his own counsel from those parties who are authorized to practice law. That is the fundamental question.

Not only does a litigant have the right to

choose his own lawyer, but the lawyer acquires rights when he has been employed to represent a client. Any order such as the one in this case which attempts to prevent a member of the bar from representing his client constitutes deprivation of that lawyer's right to due proceee and equal protection of the law.

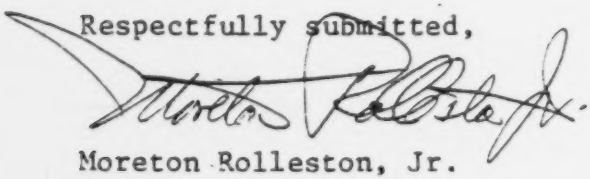
We would revert to a government of men instead of a government of laws if someone other than a client can choose that client's lawyer or can get that lawyer disqualified by the simple procedure of calling the lawyer as a witness for the opposing party.

And lastly, it is important to parties, to lawyers and to the public that the trial courts observe their own rules under which they operate. The Uniform Superior Court Rules of Georgia provide that a party is entitled to a hearing on a motion

if such a hearing is requested. The failure of the trial judge to grant a hearing in this case not only violated his own rules but constituted a denial of due process, of which another essential is a hearing.

The issues raised herein are important to the petitioner, but are far more important to the proper administration of justice.

Respectfully submitted,



Moreton Rolleston, Jr.

2604 First National Bank Tower
Atlanta, Georgia 30383
404/658-1228

APPENDIX

In the Supreme Court of Georgia

Decided: Sept 9, 1987

44586. Cherry v. Coast House, Ltd.
44587. Rolleston v. Coast House,Ltd.
44588. Rolleston v. Coast House, Ltd.
44621. Cherry v. Coast House, Ltd.
44622. Coast House Ltd.v. Cherry.
44623. Coast House Ltd.v. Cherry.
44624. Rolleston v. Coast House,Ltd.

CLARKE, Presiding Justice.

Appellant Rolleston appeals from two orders of the trial court disqualifying him from representing Mrs. Cherry and representing himself. The orders appealed from were filed December 2 and December 16, 1986. The second order was entered pursuant to a motion of appellees for clarification.

1. Rolleston complains that both orders are a nullity because he was not permitted to orally argue appellees' motions pursuant to Uniform Superior Court Rule 6.3. Prior to its 1987 amendment, Uniform Superior Court Rule 6.3 provided that all motions in civil actions except

motions for new trial and for judgment notwithstanding the verdict would be decided without oral argument. However, the rule provided that argument would be permitted upon written request. Rolleston also insists that he was entitled under Uniform Superior Court Rule 6.2 to thirty days to answer the motion for clarification which resulted in the order of December 16.

The motion for clarification which resulted in the order of December 16, 1987, was filed after Rolleston had sought and obtained from another judge in Fulton County Superior Court an ex parte temporary restraining order prohibiting appellees from communicating with Mrs. Cherry. Appellees contend that this order was obtained without any notice to appellees' attorneys. This restaining order was vacated as "inadvertently" entered after this judge learned of the December 2 order disqualifying Mr. Rolleston from representing

Mrs. Cherry.

In regard to the request for oral argument on the motion to disqualify which resulted in the December 2 order, Rolleston requested oral argument as follows: "In accordance with Rule 6.3 of the Uniform Superior Court Rules, oral argument is requested unless the Court decides to deny the motions of Coast House and Sandease." To meet the mandate of the previous Rule 6.3 a request for oral argument must have been unconditional. Such was not the case here. There is no request for argument in the record in regard to the motion for clarification which resulted in the order of December 16. Similarly, a response to a motion for clarification would not assist the court.

2. On December 4, 1986, Rolleston and Mrs. Cherry each signed pro se a notice of appeal from the order of December 2. Rolleston contends

that this notice of appeal acted as a supersedeas as to the disqualification of Rolleston to represent Mrs. Cherry. He insists that this supersedeas is an additional reason why the order of December 16 was a nullity. OCGA 5-6-46 provides that a notice of appeal serves as a supersedas in civil cases upon payment of all costs in the trial court by the appellant. Because of the effect of the supersedas the trial court loses all jurisdiction as to matters contained within the appeal. Cochran v. Carlin, 249 Ga. 510 (291 SE2d 538) (1982). However, when the order appealed from is an interlocutory order, the appellate court does not acquire jurisdiction unless the procedure of OCGA 5-6-34(b) for interlocutory appeal is followed. In that event, the trial court is not deprived of jurisdiction to proceed with the case. Carter v. Data General Corp., 162 Ga. App. 379 (291

SE2d 99) (1982). Because the order disqualifying Mrs. Cherry's attorney was an interlocutory order, the trial court did not lose jurisdiction with the filing of the notice of appeal. Ewing Holding Corp. v. Egan-Stanley Investments, 154 Ga. App. 493 (268 SE2d 733) (1980). Therefore, the trial court had jurisdiction to enter the order of December 16.

The order of December 2 was an interlocutory order, as was the order of December 16, at least insofar as that later order related to the representation of Mrs. Cherry. The notices of appeal relating to these orders were filed prior to the orders in any of the related cases. Ordinarily, an application for interlocutory appeal would be required. However, construing these orders in light of our holding in Southeast Ceramics, Inc. vs. Klem, 246 Ga. 294, 295 (271 SE2d 199) (1980) that "...when a direct appeal

is taken, any other judgments, rulings or orders rendered in the case and which may affect the proceedings below may be raised on appeal and reviewed and determined by the appellate court," we find that judicial economy will be served by consideration of the appeals from these orders in conjunction with appeals from other rulings in the case before us.

3. Having determined that the orders in question are properly before us, we proceed to address the substantive issues raised. The first issue is whether the trial court erred in disqualifying Rolleston from the representation of Mrs. Cherry. As we held in Blumenfield vs Borenstein, 247 Ga. 406,408 (276 SE2d 607 (1981), "[T]he right to counsel is an important interest which requires that an curtailment of the client's right to counsel of choice be approached with great caution." In this case Rolleston is not

only the attorney for Mrs. Cherry but is a party due to various claims of tortious interference with appellees' contract with Mrs. Cherry and due to claims which have been raised under Yost vs. Torok. Serious possibilities for conflict of interest are present when the attorney is also a party in the case. Canon 5, EC 5-1, and DR 5-101, Code of Professional Responsibility of the State Bar of Georgia (hereinafter State Bar Rules), all bear on the problem of the lawyer whose personal interests pose a potential conflict with the interests of the client. The virtual certainty that Rolleston will be called upon to testify not only as a witness for himself because of his position as a party but also as a witness on behalf of Mrs. Cherry because he was present without his client at the closing which is at the heart of this case brings EC 5-9, 5-10, and DR 5-102 of the State Bar Rules into play. In

Healthcrest, Inc. v. American Medical International, Inc. (AMI), 605 F. Supp. 1507 (N.D.Ga. 1985), the court interpreted these rules and found that the court should "... balance the harm caused to the plaintiff and the judicial system by the plaintiff being precluded from calling his attorneys to the stand with the plaintiff's right to the counsel of its choice." Id. at 1511. Finding that the testimony of the attorneys was crucial to the case, the court ruled that the attorneys must be disqualified. The situation here is very similar. The trial court did not err in disqualifying Rolleston from representing Mrs. Cherry.

The disqualification of Rolleston to represent himself presents a problem with constitutional overtones. The Constitution of Georgia, 1976, Art. I, Sec.I, Par.IX provided that no person could be deprived of the right to counsel, or to represent himself, or both. The Constitution of Georgia, 1982, Art.I, Sec. I, Par. XII now provides that "No person

shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." The question to be answered is whether a person must be forced to choose between representing himself and being represented by counsel under the change which has occurred in the Constitution.

We find that the right to represent oneself does not evaporate when an attorney is hired. However, the court must have some mechanism for asuring that the possible conflicts which may arise between the client and his counsel do not disrupt the proceedings before it. OCGA 15-19-10 provides some guidance, although it addresses the problem of disputes between counsel as to the direction of a case. The section requires that if a dispute arises when the client is not present, the court shall hear all the facts

and give preference to leading counsel, defined as the counsel upon whom the client relies more than any other. We hold that the court erred in barring Rolleston from representing himself because an appearance had been made for him by other attorneys. However, we find that the court is not required to accept random appearance and filings by both the client and his attorneys. The court has the power "[t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto..." OCGA 15-1-3 (4). The power to insure the orderly disposition of matters before it is within the general powers of every court. If Rolleston and his attorneys are unable to coordinate their efforts so that they speak with one voice, the court is empowered

to appoint a leading counsel who shall be the spokesperson.

4. The remaining cases are appeals and cross-appeals involving the grant and denial of various motions for summary judgment and an appeal from the denial of a motion to disqualify the trial judge. Upon review, we find no error in the disposition of appeals 44588, 44621, 44622, 44623 and 44624.

We affirm the court's finding that there is no basis for the recusal of Judge Frank Eldridge in that the motion was unverified, not accompanied by any affidavit, and did not set forth any grounds recognized as grounds for recusal.

The appeals and cross-appeals in 44621, 44622, 44623, 44624 all arise from the trial court's order of January 8, 1987, on the cross-

motions for summary judgment filed by the parties.

We affirm the court's granting Coast House and Sandease's motion for summary judgment as to certain issues and denying summary judgment to Mrs. Cherry on these issues. We affirm the trial court's denial of summary judgment to Coast House and Sandease on certain issues as to which there are issues of material fact remaining.

We affirm the trial court's grant of summary judgment to Mrs. Cherry on the issue of punitive or exemplary damages. We affirm the trial court's grant of summary judgment to Rolleston as to the claim against him for tortious interference with contract. We affirm the denial of summary judgment to him as to any Yost v. Torok claim which might now exist or arise in the future.

Judgment affirmed in 44586, 44588, 44621, 44622

44623, and 44624. Judgment in 44587 is affirmed in part and reversed in part. All the Justices concur, except Weltner, J., who is disqualified and Bell, J. who concurs in the judgment only.

APPENDIX B

Article 1, Section 1, Paragraph IV of the Constitution of the State of Georgia:

> "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both."

APPENDIX C

In The Superior Court for the County of Fulton

State of Georgia

COAST HOUSE, LTD, et al) Plaintiffs)		
vs.	)	Civil Action
	)	File No. D-27179
REBECCA W. CHERRY and MORETON ROLLESTON,JR., Defendants.	)	

O R D E R

Plaintiff's Motion for Disqualification of Moreton Rolleston, Jr., who is a named party defendant in this action, as counsel for Mrs. Rebecca W. Cherry came on regularly for consideration purusuant to Rule 6, Uniform Rules of the Superior Court, and is hereby granted.

SO ORDERED this 2nd day of December, 1986.

/s/ Frank M. Eldridge

Frank M. Eldridge, Judge
Fulton Superior Court
Atlanta Judicial Circuit

IN THE
SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA

COAST HOUSE, LTD, and SANDEASE, LTD.,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION
MRS. REBECCA W. CHERRY and MORETON ROLLESTON,JR.	)	FILE NO. D-27179
Defendants.	)	

O R D E R

Plaintiffs Coast House, Ltd. and Sandease Ltd. motion for clarification came before this Court for consideration and the Court rules as follows:

It is hereby ordered that all pleadings and other correspondence relating to this action filed or sent by all parties be served on Mrs. Rebecca W. Cherry as counsel pursuant to the

Civil Practice Act until such time as she withdraws her pro se appearance in the action by proper pleading and designates other counsel to represent her in this action and such other counsel files a notice of appearance in this action.

An appearance having been made by Rush S. Smith, Jr. and John E. Hall, Jr. of the law firm of Hart & Sullivan, P.C. for the Defendant Moreton Rolleston, Jr., and the Court having found there is a conflict as Moreton Rolleston, Jr. will be called as a witness on behalf of the Plaintiffs, the Court finds that as long as Moreton Rolleston, Jr. is represented by counsel he cannot appear on his own behalf pro-se. Therefore, the Court orders that all pleadings and other correspondence relating to this action filed or sent by all parties be served on

Moreton Rolleston, Jr. through his above stated attorneys of record.

SO ORDERED this 16th day of December, 1986.

/s/ Frank M. Eldridge

Frank M. Eldridge, Judge
Fulton Superior Court
Atlanta Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing "Petition for a Writ of Certiorari to the Supreme Court of Georgia" upon counsel for all parties by placing three copies in the United States Mail, postage prepaid, properly addressed, as follows:

Austin Catts
92 Luckie Street, N.W.
Atlanta, Georgia 30303

This 20th day of November, 1987.

Moreton Rolleston, Jr.